



Signed and Filed: April 25, 2018



**HANNAH L. BLUMENSTIEL
U.S. Bankruptcy Judge**

UNITED STATES BANKRUPTCY COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

9 In re:) Case No. 13-55929 HLB
10 SCOTT A. GROVER,)
11 Debtor.)
12 BRIAN TURLINGTON,)
13 Plaintiff,) Adv. Proc. No. 16-05083 HLB
14 v.)
15 SCOTT A. GROVER,)
16 Defendant.)

MEMORANDUM DECISION FOLLOWING TRIAL

I. INTRODUCTION

19 This case came before the court on February 6, 2018 for
20 trial on Plaintiff Brian Turlington's First Amended Complaint
21 (the "FAC"). [Dkt. 44.] Mr. Turlington seeks a judgment
22 against Defendant Scott Grover in the amount of \$48,799.45,
23 with statutory interest from June 1, 2014, and a determination
24 that the judgment is nondischargeable pursuant to 11 U.S.C.

1 §§ 523(a)(2)(A), 523(a)(3)(A), 523(a)(3)(B), and 523(a)(6).^{1,2}

2 Ms. Linda Sunde appeared on behalf of Mr. Turlington. Mr.
3 David Smyth appeared on behalf of Mr. Grover. The court denied
4 Mr. Grover's motion for a directed verdict at trial. After
5 both sides presented their testimony and evidence, the court
6 took the matter under submission.³

7 This memorandum decision constitutes the court's findings
8 of facts and conclusions of law as required by Rule 52(a)(1) of
9 the Federal Rules of Civil Procedure, which applies in this
10 proceeding pursuant to Rule 7052.

11 **II. JURISDICTION**

12 In his Answer to the FAC, Mr. Grover asserted as an
13 affirmative defense: "Neither the Bankruptcy Court nor the U.S.
14 District Court nor any other Federal Court has jurisdiction to
15 try this case in that the only present 'case or controversy'
16 concerns the amount owed on the underlying debt, which involves
17 no federal issues." Answer at 2. Mr. Grover and Mr. Turlington,
18 however, had already consented to entry of final judgment by this
19 court at a scheduling conference on May 3, 2017. To the extent
20

21 ¹ Unless otherwise noted, all statutory citations shall refer to Title 11 of
22 the United States Code, aka the "Bankruptcy Code," and any references to rules
23 shall refer to the Federal Rules of Bankruptcy Procedure.

24 ² Mr. Turlington requested attorneys' fees and costs in the FAC but did not
25 pursue the request in his Trial Brief or at trial. Accordingly, the court
26 deems this request waived. In addition, Mr. Turlington requested in his Trial
27 Brief punitive damages, damages for emotional distress, and what appear to be
28 compensatory damages in the form of additional interest on certain loans. He
 did not, however, request this relief in his FAC. Accordingly, the court will
 not consider this request.

29 ³ The court admitted Plaintiff's Exhibits 1 through 33, 35 through 37, and 41.
30 Defendant did not introduce any exhibits.

1 that Mr. Grover intended to reverse his position with respect to
2 consent to entry of final judgment, he did not assert the
3 affirmative defense in his Trial Brief or at trial, so the court
4 deems it waived. The court has jurisdiction over this action
5 pursuant to 28 U.S.C. § 1334, 28 U.S.C. § 157(a), and General
6 Order 24 of the United States District Court for the Northern
7 District of California, as confirmed by the parties' express
8 consent to entry of a judgment by this court. This is a core
9 proceeding within the meaning of 28 U.S.C. § 157(b)(2)(I). Venue
10 is proper under 28 U.S.C. § 1409(a).

11 **III. FINDINGS OF FACT**

12 **a. Background**

13 Mr. Turlington graduated from Duke University School of Law
14 in 2000, after a career as a teacher. He worked two and a half
15 years as an insurance defense attorney before relocating to
16 Monterey County in 2004. Since then, he has focused his practice
17 on employment law.

18 In 2008, Mr. Turlington and his wife met Mr. Grover at a
19 concert at Monterey's Golden State Theater. At that time, Mr.
20 Grover owned the Alternative Café: a coffee shop, gift shop, art
21 gallery, and performance space. The Turlingtons became patrons
22 of the Alternative Café and came to know Mr. Grover personally
23 and professionally: they bought pieces of art from Mr. Grover,
24 invested in a company he owned (Boundward, Inc.), and socialized
25 with Mr. Grover privately and publicly.

26 About four years after Mr. Turlington and Mr. Grover met,
27 the Golden State Theater caught fire and closed for repairs. Mr.
28 Grover, a licensed contractor, was hired to do repairs on the

1 building. At around this time, Mr. Grover expressed to Mr.
2 Turlington an interest in renting the Golden State Theater to
3 produce larger events. Eventually, Mr. Grover formed Golden
4 State Theater Partners LLC ("GST Partners") and reopened the
5 venue. Mr. Turlington invested in GST Partners and helped Mr.
6 Grover interface with the community: garnering support from the
7 city of Monterey and local businesses, and introducing Mr. Grover
8 to other investors.

9 Mr. Turlington also introduced Mr. Grover to a friend, Mr.
10 David Lefkowitz, a music promoter who ran the Warfield Theater in
11 San Francisco. Mr. Turlington hoped that Mr. Lefkowitz would
12 help bring acts to the Golden State Theater. Though he had only
13 a 5% stake in GST Partners, Mr. Turlington testified that he had
14 an emotional investment in the venue; he is a live music fan and
15 wanted the Golden State Theater to do well. In an effort to help
16 Golden State Theater succeed, he made a series of loans to Mr.
17 Grover and/or GST Partners to help fund the endeavor; e.g. for
18 legal fees, for deposits for performers, and other last-minute
19 expenses needed to ensure a show could go on. Some of those
20 loans are the subject of this adversary proceeding.

21 **b. The Loans**

22 Mr. Turlington made the loans in question to Mr. Grover
23 and/or GST Partners between August 30, 2012 - May 9, 2013. The
24 parties do not dispute the date, amount, or terms of the loans.
25 They do dispute whether Mr. Turlington made the loans to Mr.
26 Grover personally or to GST Partners. Mr. Grover asserts that
27 Mr. Turlington made the loans to GST Partners; Mr. Turlington
28 asserts he made the loans to Mr. Grover. Regardless of whether

1 the loans were initially made to Mr. Grover personally or to GST
2 Partners, a subsequent agreement between Mr. Grover and Mr.
3 Burlington (the "Loan Agreement" discussed below) made Mr. Grover
4 personally liable for all of the loans. So, for purposes of this
5 adversary proceeding, the court finds that Mr. Burlington loaned
6 money to Mr. Grover. The court summarizes each loan below.

7 On August 30, 2012, Mr. Burlington loaned Mr. Grover \$3,000
8 for legal fees. [Ex. 2 at 5.] Mr. Burlington wrote two checks
9 to fund this loan: check number 731 in the amount of \$1,000
10 payable to Parravano Witten, P.C. with a memo "Retainer - Golden
11 State Theater Partners, LLC"; and check number 732 in the amount
12 of \$2,000 payable to Scott Grover with a memo "Golden State
13 Theater Partners, LLC for [illegible]." [Id.] Mr. Burlington
14 testified that this was a personal loan to Mr. Grover; that the
15 check to Parravano Witten, P.C. was for a retainer so Mr. Grover
16 could employ Parravano Witten, P.C. to help set up GST Partners,
17 and that the check to Mr. Grover was for legal fees to set up the
18 operating agreement and other documentation for GST Partners.
19 Mr. Burlington did not testify that Mr. Grover made any
20 representations to him with respect to this loan and his ability
21 or intent to repay it.

22 On September 28, 2012, Mr. Burlington loaned \$30,000 to Mr.
23 Grover. A "Promissory Note Secured by Deed of Trust" (the
24 "September 28 Note"), prepared by Mr. Burlington and signed by
25 Mr. Grover on September 28, 2012, memorialized the transaction.
26 [Ex. 4.] Pursuant to the September 28 Note, the loan matured two
27 months later, on December 28, 2012, at which point principal and
28 interest of 10% per annum became due. [Id.] Paragraph 3 of the

1 September 28 Note states that it is secured in accordance with a
2 concurrent deed of trust. [Id.] On cross-examination, Mr.
3 Turlington testified that he used a template for the September 28
4 Note, that it was an initial document to memorialize their plan
5 going forward, and that they did not execute a deed of trust.
6 Mr. Turlington wrote three checks to fund this loan: check
7 number 735 payable to Warren Dewey for \$20,000 with a memo "for
8 GST/Scott Grover Note"; and check numbers 737 and 738, each for
9 \$5,000 payable to Mr. Grover and bearing a memo that stated:
10 "GST/Grover Note." [Ex. 3 at 5.]

11 Mr. Turlington testified that he made this loan based upon
12 Mr. Grover's representations that he had an investor lined up who
13 was going to give him money (presumably with which he would repay
14 Mr. Turlington) and that Mr. Grover owned an unimproved parcel on
15 Orcas Island, Washington (the "Property")⁴ worth in excess of
16 \$100,000 that could ultimately provide security for the loan. On
17 cross-examination, Mr. Turlington testified that he did not ask
18 Mr. Grover if the Property was already encumbered by any liens or
19 deeds of trust; that during the time he was loaning money to Mr.
20 Grover, he did not have knowledge of Mr. Grover's personal
21 finances; and that he knew the Golden State Theater was
22 underfunded.

23 On October 9, 2012, Mr. Grover signed a handwritten note
24 stating that he personally owed Mr. Turlington \$2,000 for "cash
25 advance;" \$189.61 for Home Depot; and "credit card reimbursement
26 for light guy at Howard Johnson's" (the "October 9 Note"). [Ex.
27

28 ⁴ The Property is located at NHN Kellebrew Lake Rd, Orcas Island, Washington,
APN # 262250015000.

1 5 at 1.] The October 9 Note provided for payment in full with no
2 interest by October 16, 2016, or payment thereafter with 10
3 percent interest. [Id.] The total amount owed to Mr. Turlington
4 under the October 9 Note was \$2,314.81. Mr. Turlington testified
5 that he made this loan because he had in the past loaned small
6 amounts of money to Mr. Grover under similar circumstances in
7 connection with the Alternative Café and that Mr. Grover had paid
8 back many of those loans. He also testified that he made the
9 loan relying in part on Mr. Grover's representation in connection
10 with the September 28, 2012 loan that the Property could secure
11 it.

12 On November 8, 2012, Mr. Grover signed a handwritten note
13 stating that he personally owed Mr. Turlington \$2,700 for
14 "deposits on Robert Cray Band/Kenny Wayne Shepherd concerts set
15 for November 15, 2012" (the "November 8 Note"). [Ex. 6 at 1.]
16 The November 8 Note goes on to state: "This amount is on top of
17 \$2,000 on 10/9/12 and affiliated credit card charges in that
18 note, plus \$30,000 promissory note to be secured by [the
19 Property], all of which will be memorialized in a new note."
20 [Id.] To fund the November 8 Note, Mr. Turlington obtained two
21 cashier's checks, each in the amount of \$1,350 and made payable
22 to William Morris Endeavor Entertainment. [Id. at 2.] A memo on
23 one of the cashier's checks stated "Kenny Wayne Shepherd"; a memo
24 on the other stated "The Robert Cray Band." [Id.] Mr.
25 Turlington testified that, at the time he made this loan, he and
26 Mr. Grover were engaged in an ongoing conversation regarding
27 securing the loans with the Property.

28

1 On November 29, 2012, Mr. Grover signed a handwritten note
2 stating that, on behalf of GST Partners, he owed Mr. Turlington
3 \$3,000 for a loan to cover an advance for performer John Prine
4 (the "November 29 Note"). [Ex. 7 at 2.] The November 29 Note
5 goes on to state that "Scott will tender \$3,000 no later than
6 Friday, December 7, 2012" and that if he does not pay in full by
7 that date, a \$10 per day surcharge would be assessed until the
8 loan was paid in full, which must occur no later than December
9 30, 2012. [Id.]

10 On December 15, 2012, Mr. Turlington loaned \$25,080 to Mr.
11 Grover and/or GST Partners. He funded this loan with check
12 number 756 for \$1,680 payable to GST Partners and with a cash
13 withdrawal in the amount of \$23,400. [Ex. 9 at 3 and 5.] Mr.
14 Turlington testified that he used the cash to purchase cashier's
15 checks payable to an unspecified performer's management company.
16 He also testified that these were personal loans to Mr. Grover
17 and that he made check number 756 payable to GST Partners by
18 mistake. Mr. Turlington testified that, prior to loaning this
19 money, Mr. Grover provided him with an appraisal dated August 1,
20 2011 that valued the Property at \$125,000. [Ex. 8.] Mr.
21 Turlington testified that Mr. Grover repeatedly assured him that
22 his loans were "safe and secure" because the Property could
23 secure those obligations.

24 On December 27, 2012, Mr. Turlington signed a handwritten
25 note stating that he lent GST Partners \$1,000 as an advance for
26 marketing purposes ("December 27 Note"). [Ex. 10.] The December
27 Note provides that the loan shall be paid in full by close of
28 business on January 15, 2013; otherwise, a \$10 per day penalty

1 would be assessed until the loan was paid in full. [Id.] Mr.
2 Turlington testified that he understood that Mr. Grover
3 personally guaranteed the December 27 Note. He also testified
4 that he and Mr. Grover continued to discuss securing all
5 outstanding loans with the Property.

6 On January 8, 2013, Mr. Turlington signed a handwritten note
7 stating that he lent Mr. Grover \$1,000 for marketing purposes;
8 that the amount was due on January 18, 2013; and that if not paid
9 in full on that date, Mr. Grover would owe an additional \$10 per
10 day until it was paid in full ("January 8 Note"). [Ex. 11.] Mr.
11 Turlington did not testify as to any representations Mr. Grover
12 may have made with respect to this loan concerning his ability or
13 intent to repay it or to secure it with the Property or any other
14 collateral.

15 In early January 2013, when the investment that would repay
16 the \$30,000 September 28 Note had not materialized, Mr.
17 Turlington began to investigate the Property to confirm that it
18 had value sufficient to ensure repayment of the loans, which by
19 then totaled approximately \$68,000. Mr. Turlington testified
20 that he was exploring his options, including whether to obtain a
21 deed of trust or title to the Property, and that he and Mr.
22 Grover were communicating about these options.

23 Mr. Turlington readily admitted that he had no experience
24 personally or professionally with real estate transactions or in
25 documenting secured transactions. But he did not seek legal
26 counsel in connection with his loans to GST Partners and/or Mr.
27 Grover until in or around January 2013. Mr. Turlington obtained
28 such advice from Mr. Troy Kingshaven, a business transaction/real

1 estate attorney employed by Fenton & Keller PC, who identified
2 for Mr. Turlington the steps he needed to take to secure the
3 loans he had made to GST Partners and/or Mr. Grover, such as
4 obtaining a title report and title insurance. Mr. Turlington
5 began researching what these steps would cost and what the
6 closing costs would be if the Property were sold. [Exs. 13-14.]
7 He then obtained a valuation of \$92,570 for the Property from the
8 San Juan County Assessor's website. [Ex. 12.]

9 On February 6, 2013, Mr. Turlington emailed Chicago Title
10 Company requesting a preliminary title report for the Property.
11 [Ex. 15.] In that email he stated: "[H]opefully nothing is
12 recorded against the parcel." [Id. at 2.] Mr. Turlington
13 testified that he received the preliminary title report the same
14 day via email but did not review it because the electronic file
15 was large and had formatting issues that made it difficult to
16 print.

17 On February 26, 2013, Mr. Turlington loaned Mr. Grover
18 \$20,000 for a BB King show at the Golden State Theater. Mr.
19 Turlington testified that he withdrew that amount in cash and
20 gave it to Mr. Grover. [See Ex. 17 at 1; Ex. 18 at 4.] Mr.
21 Turlington did not testify that Mr. Grover made any
22 representations with respect to this loan concerning his ability
23 or intent to repay or to secure the loan with the Property or any
24 other collateral.

25 On March 10, 2013, Mr. Turlington loaned Mr. Grover \$500,
26 which he withdrew in cash from his bank account. [Ex. 17 at 2;
27 Ex. 18 at 4.] Mr. Turlington did not testify that Mr. Grover
28 made any representations with respect to this loan concerning his

1 ability or intent to repay or to secure the loan with the
2 Property or any other collateral.

3 After Mr. Turlington made the February 26 and March 10 loans
4 to Mr. Grover, he finally reviewed the title report that he had
5 received a month earlier. The title report disclosed a deed of
6 trust in favor of Cedar Funding Inc. ("Cedar Funding") recorded
7 against the Property, securing a debt owed by Mr. Grover in the
8 amount of \$100,000. [Ex. 19A.] The Cedar Funding deed of trust
9 had been recorded on June 30, 2005. [Ex. 20.]

10 Mr. Turlington testified that he immediately confronted Mr.
11 Grover about the Cedar Funding deed of trust, and that Mr. Grover
12 responded: "What does that mean?" Mr. Turlington accused Mr.
13 Grover of having deceived him: the loans could not be secured by
14 the Property because if it were sold, all of the proceeds would
15 go to Cedar Funding. According to Mr. Turlington, Mr. Grover did
16 not have a response to his accusations, other than to say he
17 would look into the matter. When Mr. Turlington raised the issue
18 later, Mr. Grover informed him that there was a way to have the
19 Cedar Funding deed of trust "removed" because Cedar Funding no
20 longer existed, and that he was looking into it.

21 Mr. Turlington also testified to another conversation with
22 Mr. Grover about the Cedar Funding deed of trust, which took
23 place on April 21, 2013. According to Mr. Turlington, Mr. Grover
24 represented that he had someone who could "fix the paperwork" so
25 that the lien could be "removed" and asked Mr. Turlington to "let
26 it sit" for 90 days while that was done.

27 On May 9, 2013, before the issue with the Cedar Funding deed
28 of trust had been resolved, Mr. Turlington loaned Mr. Grover

1 another \$936.34 for an insurance payment. [Ex. 22.] After May
2 9, 2013, Mr. Turlington made no further loans to Mr. Grover or to
3 GST Partners.

4 **c. The Orcas Island Property**

5 Mr. Grover's Orcas Island property originally consisted of
6 two parcels, one undeveloped (the Property), and one improved
7 with a house, in which his mother lived (collectively, the "Orcas
8 Island Property"). He acquired the Orcas Island Property about
9 15 years ago, after the previous owner - his mother's landlord -
10 died. Mr. Grover's mother wanted someone to buy the Orcas Island
11 Property so that she could continue to live there, so Mr. Grover
12 borrowed money from Cedar Funding to make the purchase. He had
13 no prior experience buying real property and did not consult a
14 lawyer or other real estate professional to help him with the
15 purchase of the Orcas Island Property.

16 Mr. Grover initially understood that he had transferred
17 title to the Property to Cedar Funding in lieu of a down payment
18 for purchase of the Orcas Island Property. Rather than taking
19 title to the Property, however, Cedar Funding recorded a deed of
20 trust against the Property - a fact of which Mr. Grover did not
21 become aware until much later.

22 Mr. Grover explained this oversight by admitting that he
23 signed the Cedar Funding deed of trust on June 25, 2005, but that
24 it was among many documents he signed without reading at the time
25 the transaction with Cedar Funding closed. He received a stack
26 of documents with stickers on the pages he needed to sign, and he
27 simply flipped through the stack and signed where instructed.

28

1 Mr. Grover never received a mortgage bill for the Property from
2 Cedar Funding.

3 Mr. Grover did not learn he held title to the Property until
4 several years later, when he contacted the San Juan County
5 Treasurer ("County Treasurer") about property taxes he had been
6 paying for the improved parcel. According to Mr. Grover, he had
7 discovered that Wells Fargo Bank had also been paying property
8 taxes for the improved parcel and wanted to know why the County
9 Treasurer had been billing him. The County Treasurer informed
10 him that actually, he had been paying property taxes for the
11 Property - not the improved parcel - because he owned it.

12 Later, he learned that Cedar Funding had collapsed and he
13 assumed that it had made a mistake with respect to the transfer
14 of the Property. Mr. Grover was not paying a mortgage on the
15 Property, but was paying the mortgage on the improved parcel,
16 where his mother lived, until he opened the Golden State Theater.
17 He explained that he did not receive a salary from GST Partners,
18 became unable to pay the mortgage, and filed bankruptcy to stop
19 the pending foreclosure of his mother's home.

20 **d. The Loan Agreement**

21 On May 21, 2013, Mr. Turlington and Mr. Grover signed a
22 document summarizing the loans identified above and setting forth
23 the terms governing how and when Mr. Grover would repay them (the
24 "Loan Agreement"). [Ex. 1.] The Loan Agreement established the
25 total amount due and owing at \$89,531.45. [Id. at 2.]

26 The Loan Agreement provided that, until the Cedar Funding
27 deed of trust was removed from the Property or otherwise
28 satisfied, Mr. Grover's debt to Mr. Turlington would be secured

1 by 42 works of art owned by Mr. Grover. [Id.] The Loan
2 Agreement identified and ascribed a value to each piece of art.
3 [Id. at 2-4.] The parties agreed that the works of art were
4 worth \$63,192, and that \$26,339.45 of the debt remained
5 unsecured. [Id. at 4.]

6 The Loan Agreement further provided that Mr. Turlington
7 would return the artwork to Mr. Grover when he had "resolved" the
8 Cedar Funding deed of trust and had transferred the Property to
9 Mr. Turlington. [Id.] If that did not occur by August 1, 2013,
10 Mr. Turlington would keep the artwork and Mr. Grover would owe
11 him \$26,339.45, which Mr. Grover would repay beginning September
12 1, 2013 with a single payment of \$1,339.45 and monthly
13 installment payments of \$2,500 October 1, 2013 through June 1,
14 2014. [Id. at 4-5.]

15 Mr. Turlington personally viewed all 42 pieces of art in Mr.
16 Grover's home at the time he and Mr. Grover signed the Loan
17 Agreement. Mr. Turlington began taking possession of the artwork
18 that day, a couple of pieces at a time. When he came back to
19 pick up additional artwork within a week of signing the Loan
20 Agreement, however, 18 pieces had gone missing. Ultimately, Mr.
21 Turlington took possession of only 24 of the 42 pieces of art to
22 which he was entitled under the Loan Agreement.

23 After he and Mr. Turlington signed the Loan Agreement, Mr.
24 Grover did not resolve the Cedar Funding deed of trust or
25 transfer the Property to Mr. Turlington, did not turn over the 18
26 missing pieces of artwork, did not make any payments under the
27 Loan Agreement, and did not contact Mr. Turlington about
28 repayment. Mr. Grover believed that Mr. Turlington had lost

1 interest in obtaining payment for the loan, and that once the
2 Golden State Theater shut down, Mr. Grover focused solely on his
3 survival.

4 Mr. Turlington also introduced the testimony of Mr. Matthew
5 Bucholtz, who had loaned \$20,000 to Mr. Grover. This loan was
6 memorialized in a May 9, 2013 email that Mr. Turlington did not
7 introduce as evidence. Mr. Bucholtz testified that Mr. Grover
8 asked for the loan to cover a debt owed by Golden State Theater
9 to a band called "Dead Can Dance." According to Mr. Bucholtz,
10 Mr. Grover agreed to repay the full amount by June 21, 2013, and
11 that Mr. Grover's entire collection of artwork would serve as
12 collateral for the loan.

13 After Mr. Grover and Mr. Turlington executed the Loan
14 Agreement, but before Mr. Turlington could collect all of the
15 collateral, Mr. Bucholtz went to Mr. Grover's residence and
16 picked up eight pieces of art to secure his loan. Mr. Grover did
17 not tell Mr. Bucholtz that he had promised the artwork to anyone
18 else. Mr. Grover never repaid the loan, and Mr. Bucholtz kept
19 the artwork.

20 Mr. Grover does not know what became of the other 10 missing
21 pieces of art, although he thought one or two might be in storage
22 or might have been taken by Mr. Turlington. Mr. Grover conceded
23 that he never attempted to retrieve stored artwork for Mr.
24 Turlington.

25 According to Mr. Grover, when he and Mr. Turlington entered
26 into the Loan Agreement, Mr. Turlington knew about his prior
27 agreement with Mr. Bucholtz because all of them were working
28 together continuously to try to keep the Golden State Theater

1 open. Mr. Grover admitted, however, that he did not inform Mr.
2 Turlington of his agreement with Mr. Bucholtz, but repeated that
3 Mr. Turlington must have known about it because he was deeply
4 involved in GST Partners.

5 **e. Remaining Debt Owed to Mr. Turlington**

6 Mr. Turlington seeks a judgment against Mr. Grover in the
7 amount of \$48,799.45, with statutory interest from June 1, 2014.⁵
8 The amount sought is the different between the \$89,531.45
9 accumulated debt and the \$40,372 value of the artwork Mr.
10 Turlington obtained, plus interest. [Pltf.'s Trial Brief at 7-
11 8.] Mr. Grover does not dispute that the amount of the remaining
12 debt is \$48,799.45 and does not address Mr. Turlington's request
13 for interest. [Def.'s Trial Brief at 1.] The court finds,
14 however, that the Loan Agreement, which superseded all prior loan
15 agreements, does not provide for payment of interest on the debt.
16 [See Ex. 1.] Accordingly, the court finds and concludes that the
17 amount Mr. Grover owes to Mr. Turlington is \$48,799.45. While
18 the court will not award pre-judgment interest, it will award
19 post-judgment interest at the federal rate of 2.18%. 28 U.S.C.
20 § 1961(a) ("[i]nterest shall be allowed on any money judgment in
21 a civil case recovered in a district court.").

22 **f. Mr. Grover's Bankruptcy Case**

23 Mr. Grover filed a voluntary petition under Chapter 13 of
24 the Bankruptcy Code on November 12, 2013, almost five months
25

26 ⁵ In his Trial Brief, Mr. Turlington asks the court to award damages for Mr.
27 Grover's alleged fraud in the form of additional prejudgment interest on
28 certain loans. The court will not award the requested damages for two
reasons: first, as noted above, Mr. Turlington did not request such damages
in his FAC; second, as discussed below, the court does not find that Mr.
Grover acted with fraudulent intent.

1 after he signed the Loan Agreement. [Ex. 23 at 2.] Mr. Grover
2 did not include Mr. Turlington in the creditor matrix, (id. at 7-
3 9) in the Chapter 13 Plan (Ex. 24), or in the schedules listing
4 Mr. Grover's creditors (Ex. 28 at 9-15). Mr. Turlington did not
5 receive notice of Mr. Grover's bankruptcy case or of the
6 deadlines to file a proof of claim or a nondischargeability
7 complaint. [Ex. 25 at 6, 10; Ex. 26; Ex. 27.] The deadline for
8 non-governmental creditors to file a proof of claim expired on
9 April 2, 2014; the deadline to challenge the dischargeability of
10 debts expired on March 3, 2014. [Ex. 25 at 7.] Mr. Turlington
11 did not learn of Mr. Grover's bankruptcy cased until 2016, long
12 after the foregoing deadlines had passed.

13 The court confirmed Mr. Grover's Chapter 13 Plan on February
14 5, 2015. [Bankr. Dkt. 52.] Mr. Turlington filed his complaint
15 on November 16, 2016 and his FAC on January 18, 2018. On January
16 3, 2018, the court dismissed Mr. Grover's bankruptcy case for
17 failure to make plan payments. [Bankr. Dkt. 77.] Given the
18 dismissal of his bankruptcy case, Mr. Grover did not receive a
19 discharge of his debts. The court retained jurisdiction over
20 this adversary proceeding because the parties were very close to
21 trial, and because a judgment in favor of Mr. Turlington on his
22 claims for relief under sections 523(a)(2)(A) and 523(a)(6) would
23 render the debt owed by Mr. Grover nondischargeable in any future
24 bankruptcy case he might commence. In addition, retaining
25 jurisdiction would prevent Mr. Grover from allowing the
26 underlying bankruptcy case to be dismissed to avoid an
27 unfavorable judgment.

28

1 **IV. CONCLUSIONS OF LAW**

2 **a. Exception to Discharge under 11 U.S.C. § 523(a)(3)(A)**

3 Section 523(a)(3)(A) excepts from discharge unscheduled
4 debts that are not of the type described in sections 523(a)(2),
5 (a)(4), or (a)(6), where the creditor had no notice or actual
6 knowledge of the case in time to file a timely proof of claim.

7 In re Purcell, 362 B.R. 465, 472 (Bankr. E.D. Cal. 2007).

8 Here, no one disputes that Mr. Turlington had no notice or
9 actual knowledge of Mr. Grover's bankruptcy case in time to file
10 a timely proof of claim. Mr. Grover did not, however, receive a
11 discharge in his bankruptcy case, so Mr. Turlington's claim for
12 relief under section 523(a)(3)(A) is moot.

13 **b. Exception to Discharge Under 11 U.S.C. § 523(a)(3)(B)**

14 Section 523(a)(3)(B) excepts from discharge unscheduled
15 debts of the type described in sections 523(a)(2), (a)(4), or
16 (a)(6) where the creditor had no notice or actual knowledge of
17 the case in time to file a timely proof of claim or to timely
18 request a determination of dischargeability of such debt. 11
19 U.S.C. § 523(a)(3)(B). Whereas section 523(a)(3)(A) provides
20 that a qualified debt is not discharged in the instant bankruptcy
21 case, section 523(a)(3)(B) allows a creditor who has not been
22 timely notified of a bankruptcy case to seek a
23 nondischargeability judgment that would apply to all future
24 bankruptcy cases. In other words, section 523(a)(3)(B) provides
25 an exception to the general rule that a nondischargeability
26 complaint must be filed within 60 days of the section 341(a)
27 meeting of creditors. Irons v. Santiago (In re Santiago), 175
28 B.R. 48, 49 (B.A.P. 9th Cir. 1994). When section 523(a)(3)(B)

1 applies, a complaint may be filed at any time. Fed. R. Bankr. P.
2 4007(b); In re Santiago, 175 B.R. at 52.

3 Mr. Turlington asserts that the debt owed to him by Mr.
4 Grover is nondischargeable pursuant to sections 523(a)(2) and
5 (a)(6). Because Mr. Turlington did not have actual notice or
6 knowledge of Mr. Grover's bankruptcy case, the court deems his
7 complaint and the FAC, timely pursuant to section 523(a)(3)(B).⁶

8 **c. Exception to Discharge Under 11 U.S.C. § 523(a)(2)(A)**

9 Section 523(a)(2)(A) provides: "(a) A discharge under . . .
10 this title does not discharge an individual debtor from any debt-
11 . . . (2) for money, property, services, or an extension,
12 renewal, or refinancing of credit, to the extent obtained by –
13 (A) false pretenses, a false representation, or actual fraud,
14 other than a statement respecting the debtor's or an insider's
15 financial condition." 11 U.S.C. § 523(a)(2)(A).

16 To prevail in a section 523(a)(2)(A) action, a creditor must
17 prove five elements by a preponderance of the evidence: (1) a
18 misrepresentation, fraudulent omission or deceptive conduct by
19 the debtor; (2) knowledge of the falsity or deceptiveness of his
20 statement or conduct; (3) the debtor made the misrepresentation
21 with the intention and purpose of deceiving the creditor; (4) the
22 creditor justifiably relied on the misrepresentation; and (5) the
23 creditor sustained damage as the proximate result of the
24 misrepresentation. Turtle Rock Meadows Homeowners Ass'n. v.
25 Slyman (In re Slyman), 234 F.3d 1081, 1085 (9th Cir. 2000). The
26 court narrowly construes section 523(a)(2)(A) in favor of the

27
28 ⁶ Mr. Grover does not dispute the applicability of section 523(a)(3)(B) to the
complaint or the FAC.

1 debtor. Snocke v. Riso (In re Riso), 978 F.2d 1151, 1154 (9th
2 Cir. 1992).

3 Mr. Turlington extended multiple loans to Mr. Grover based
4 on a general understanding that the Property could serve as
5 collateral for those loans should the need arise. Mr. Turlington
6 argues that Mr. Grover's failure to inform him of the \$100,000
7 Cedar Funding deed of trust recorded against the Property
8 constitutes a fraudulent omission that justifies a determination
9 that Mr. Grover's debt to Mr. Turlington is nondischargeable
10 under section 523(a)(2)(A). While that omission was material,
11 Mr. Turlington has not proven by a preponderance of the evidence
12 that Mr. Grover had knowledge of the falsity of his
13 representation that the Property could secure the loans, that Mr.
14 Grover made that representation with the intent to deceive Mr.
15 Turlington, or that Mr. Turlington reasonably relied upon the
16 representation.

17 Mr. Grover credibly testified to his belief that he had
18 transferred title to the Property to Cedar Funding as part of the
19 transaction in which he bought the Orcas Island Property and that
20 he found out only years later that Cedar Funding had collapsed,
21 and that he still held title to the Property. He also credibly
22 testified that, even though he signed the Cedar Funding deed of
23 trust, he did not read that document, and instead relied upon
24 Cedar Funding's explanation of the transaction; i.e., that he
25 would be transferring the Property to Cedar Funding in lieu of a
26 down payment for the Orcas Island Property.

27 Mr. Grover had no prior experience with real property
28 transactions and did not consult a real estate professional or an

1 attorney about his transaction with Cedar Funding. His failure
2 to investigate further into the status of the Property was
3 certainly ill-advised - just as Mr. Turlington's failure to do
4 any due diligence with respect to the Property until January
5 2013, and waiting a month to review the preliminary title report
6 were ill-advised - but Mr. Grover's ignorance does not rise to
7 the level of fraud.

8 The court also cannot lose sight of the fact that Mr.
9 Turlington continued to lend Mr. Grover money **after** he became
10 aware of the Cedar Funding deed of trust, undercutting his
11 assertion that he made the loans in reliance upon there being
12 equity in the Property. Finally, the court finds that Mr.
13 Turlington's statement in his email to Chicago Title Company that
14 "hopefully nothing is recorded against the parcel" demonstrates
15 that he had misgivings about Mr. Grover's assurances that the
16 loans were "safe and secure" and therefore cannot be found to
17 have justifiably relied upon them.

18 Though Mr. Turlington does not specialize in real estate
19 transactions, he is a trained and experienced lawyer who had
20 colleagues in the real estate sector. Trained lawyers verify
21 information with documentation. Mr. Turlington chose not to use
22 his training and contacts to verify that the Property actually
23 could secure his loans until January 2013. He did not even ask
24 Mr. Grover if there were any liens against the Property. Given
25 Mr. Turlington's training, experience, and resources, the court
26 finds that he did not reasonably rely upon Mr. Grover's statement
27 that his loans were "safe and secure." Accordingly, the court
28 finds and concludes that Mr. Turlington has not satisfied his

1 burden of proving that Mr. Grover's debt is nondischargeable
2 under section 523(a)(2)(A) based upon Mr. Grover's
3 representations regarding the availability of the Property as
4 collateral.

5 Mr. Turlington also argues that the debt owed to him by Mr.
6 Grover should be deemed nondischargeable under section
7 523(a)(2)(A) because Mr. Grover fraudulently misrepresented that
8 42 pieces of artwork would serve as collateral under the Loan
9 Agreement, when he had already promised some of those pieces to
10 Mr. Bucholtz as collateral. Section 523(a)(2)(A) applies not
11 only to money, but also to "an extension, renewal, or refinancing
12 of credit" to the extent obtained by the false representations.

13 Locke v. United States Trustee (In re Locke), 205 B.R. 592, 598
14 (B.A.P. 9th Cir. 1996).

15 "Under section 523(a)(2)(A), when a creditor does not
16 advance new money based on a false representation, the creditor
17 must show 'that it had valuable collection remedies at the time
18 of the extension or renewal, that it did not exercise [those
19 remedies] in reliance on the debtor's misrepresentation[,] and
20 that those remedies lost value during the renewal or extension
21 period . . .'" Id. (quoting Cho Hung Bank v. Kim (In re Kim),
22 163 B.R. 157, 161 (B.A.P. 9th Cir. 1994), aff'd and adopted, 62
23 F.3d 1511 (9th Cir. 1995)).

24 Mr. Turlington did not advance new money under the Loan
25 Agreement. And, at the time of the Loan Agreement, Mr.
26 Turlington had no valuable collection remedies that he eschewed
27 by entering into the Loan Agreement. He did not have (and never
28 had) a deed of trust on the Property; his only remedy was to sue

1 Mr. Grover. He still has that remedy available to him. Though
2 he did not receive all of the pieces of artwork to which the Loan
3 Agreement entitled him, he still collected 24 pieces, putting him
4 in a better position than he enjoyed absent the Loan Agreement.
5 In other words, Mr. Turlington cannot show that he sustained
6 damages by entering into the Loan Agreement in reliance upon Mr.
7 Grover's representations. Accordingly, the court finds and
8 concludes that Mr. Turlington has not satisfied his burden of
9 proving that Mr. Grover's debt is nondischargeable under section
10 523(a)(2)(A) based on Mr. Grover's misrepresentation in the Loan
11 Agreement concerning the availability of artwork to serve as Mr.
12 Turlington's collateral.

13 **d. Exception to Discharge under 11 U.S.C. § 523(a)(6)**

14 Section 523(a)(6) states that "a discharge . . . does not
15 discharge an individual debtor from any debt . . . for willful
16 and malicious injury by the debtor to another entity or to the
17 property of another entity . . ." 11 U.S.C. § 523(a)(6). The
18 injury itself must be deliberate or intentional, and not merely a
19 deliberate or intentional act that leads to injury. Kawaauhau v.
20 Geiger, 523 U.S. 57, 61-62 (1998). Thus, "debts arising from
21 recklessly or negligently inflicted injuries do not fall within
22 the compass of § 523(a)(6)." Id. at 64.

23 Section 523(a)(6) requires application of a two-pronged
24 test: a plaintiff must prove by a preponderance of the evidence
25 that the debtor's conduct in causing the injuries was both
26 willful and malicious. Carillo v. Su (In re Su), 290 F.3d 1140,
27 1146-47 (9th Cir. 2002). To prove willfulness, a plaintiff must
28 establish that "the debtor has a subjective motive to inflict

1 injury or [] the debtor believes that injury is substantially
2 certain to result from his own conduct." Id. at 1142. The
3 debtor must have intended the consequence of the act, not just
4 the act itself. Id. at 1146-47. To prove maliciousness, a
5 plaintiff must demonstrate that "the injury involves (1) a
6 wrongful act, (2) done intentionally, (3) which necessarily
7 causes injury, and (4) is done without just cause or excuse."
8 Id. (internal quotation marks and citation omitted). If the
9 plaintiff proves willfulness, the court may infer malice from the
10 wrongful nature of the act itself. Thiara v. Spycher Bros. (In
11 re Thiara), 285 B.R. 420 (B.A.P. 9th Cir. 2002). Courts must,
12 however, narrowly construe section 523(a)(6) in favor of the
13 debtor. In re Riso, 978 F.2d at 1154.

14 **i. Willfulness**

15 Mr. Turlington did not meet his burden of demonstrating that
16 Mr. Grover had a subjective motive to inflict injury or believed
17 that injury was substantially certain to result from his own
18 conduct. Both parties were excited about and invested in making
19 the Golden State Theater a success. Mr. Turlington lent money to
20 Mr. Grover for the specific purpose of keeping the Golden State
21 Theater operational and paying the performers, and the evidence
22 shows Mr. Grover used the money for that purpose.

23 Mr. Turlington has not shown that Mr. Grover extracted money
24 from him without ever intending to pay it back, or that Mr.
25 Grover knew that the Property offered as security for the loans
26 (but never actually used as security) had no equity. Mr.
27 Turlington introduced no evidence to suggest that Mr. Grover
28

1 would not have repaid the loans had the Golden State Theater been
2 successful.

3 As to the Loan Agreement, although Mr. Grover misrepresented
4 the availability of collateral, Mr. Turlington did not
5 demonstrate that he did so to inflict injury or knew that injury
6 was substantially likely to occur because of the
7 misrepresentation. Mr. Turlington had already parted with his
8 money at the time of the Loan Agreement. As discussed above, Mr.
9 Grover's misrepresentation about the collateral did not cause Mr.
10 Turlington injury; Mr. Turlington ultimately improved his
11 position via the Loan Agreement by securing payment of part of
12 the loan balance through the artwork he took. Because Mr.
13 Turlington has not proven the element of willfulness by a
14 preponderance of the evidence, the court finds and concludes that
15 Mr. Turlington has not made case for nondischargeability of the
16 loans under section 523(a)(6).

17 **ii. Maliciousness**

18 Mr. Turlington also did not prove that Mr. Grover acted
19 maliciously. With respect to Mr. Grover's misrepresentation that
20 the loans were "safe and secure" because they could be secured
21 the Property, Mr. Turlington has not demonstrated that Mr. Grover
22 intended to misrepresent the available equity in the Property.
23 As discussed above, the evidence shows that Mr. Grover was not
24 aware of the Cedar Funding deed of trust. With respect to Mr.
25 Grover's misrepresentation of available collateral in the Loan
26 Agreement, Mr. Turlington has not demonstrated that the
27 misrepresentation caused him injury. Mr. Turlington took no
28 affirmative action and did not waive any rights in reliance on

1 the Loan Agreement. Because Mr. Turlington has not shown that
2 Mr. Grover acted maliciously, the court finds and concludes that
3 Mr. Turlington has not made a *prima facie* case for
4 nondischargeability of the loans under section 523(a)(6).

5 **V. CONCLUSION**

6 For the foregoing reasons, the court rules in favor of Mr.
7 Turlington on his claim for relief under section 523(a)(3)(B)
8 finding the complaint and FAC to be timely, and rules against Mr.
9 Turlington and in favor of Mr. Grover on the claims for relief
10 under sections 523(a)(3)(A), 523(a)(2)(A), and 523(a)(6). The
11 court further rules that the outstanding debt owed to Mr.
12 Turlington by Mr. Grover is \$48,799.45, plus post-judgment
13 interest of 2.18% in accordance with 28 U.S.C. § 1961(a). Each
14 of the parties shall bear his own fees and costs. The court will
15 enter judgment consistent with this memorandum decision.

16 ****END OF ORDER****

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Court Service List

[None]